RE LOIS THERESA KAO; *EX PARTE* THE OFFICIAL ASSIGNEE

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tah F.J. and Chua J.) October 18, 1966]

[Singapore — Federal Court Civil Appeal No. 58 of 1965]

Bankruptcy — Conveyance by bankrupt — Whether fraudulent — Valuable consideration — Bankruptcy Ordinance (Cap. 11) ss. 3, 46, 51, 52.

This was an appeal against a decision of the High Court which had refused an application by the official assignee for an order to declare a conveyance of property by a bankrupt void as against the official assignee and for an order to set it aside ([1965] 2 M.L.J. 223). The learned trial judge held (1) that the conveyance was made for valuable consideration and in good faith and was therefore not void against the official assignee under section 51 of the Bankruptcy Ordinance; (2) the conveyance was not an act of bankruptcy because it was not made fraudulently; (3) the property was not conveyed in satisfaction of any debt due to the vendor and therefore section 52 of the Bankruptcy Ordinance had no application to the case. On appeal it was contended that the learned trial judge was wrong in holding that the conveyance was not fraudulent within the meaning of section 3(1)(b) of the Bankruptcy Ordinance. No complaint was made as regards the finding that there was valuable consideration for the sale of the property but it was argued that the learned trial judge failed to have regard to all the circumstances of the case when he was determining whether or not the parties to the sale had acted in good faith or were fraudulent.

Held: in this case the learned trial judge had taken everything into consideration that he should when he decided that there was no fraud in the case and therefore the appeal must be dismissed.

FEDERAL COURT.

K. S. Chung for the appellant.

Yin Ee Kheng for the 1st respondent.

R. C. H. Lim (*David Tar See* with him) for the 2nd respondent.

Cur. Adv. Vult.

Chua J.: This is an appeal from a judgment of the High Court dismissing the motion of the appellant seeking a declaration that the conveyance dated the 21st August, 1963, made between Lois Theresa Kao (who was adjudged a bankrupt on the 17th January, 1964,) as vendor and Leong Lai Peng, the first respondent, as purchaser of house No. 15 Frankel Avenue, Singapore, is void against the official assignee on the grounds

(1) that the conveyance was not made in good faith or for valuable consideration;

(2) that the conveyance was an act of bankruptcy because it was fraudulent and Lois Theresa Kao's bankruptcy related back to it and her property divisible among her creditors included the said house; and, alternatively

(3) that the conveyance was fraudulent and void against the official assignee;

and asking for an order that the conveyance be set aside.

The facts are shortly these. In 1957 the bankrupt, Lois Theresa Kao, became a partner of the petitioning creditor, Chern Dercing, in a number of businesses which ultimately failed. The bankrupt purchased No. 15 Frankel Avenue on the 15th May, 1959, for $30,000. She had $18,000 and she raised the balance by mortgaging the property to the Great Eastern Life Assurance Co. Ltd. for $12,000. In 1961 Chern Dercing sued the bankrupt in Suit No. 1578 of 1961 for $129,150 being the balance of money lent to the bankrupt. In October, 1962, the bankrupt paid off the amount due on the mortgage to the Great Eastern Life Assurancec Co. Ltd.. On the 23rd October, 1962, the bankrupt mortgaged the property to the Chung Khiaw Bank Ltd. to secure an overdraft on her current account with the bank up to the limit of $16,000. On the 3rd July, 1963, one Koh Sin Bin issued a writ against the bankrupt claiming the sum of $5,560.90 being the balance of money lent to the bankrupt. The bankrupt told her brother Kao Wei Tseng (whom I shall hereinafter call Kao) about the writ issued by Koh Sin Bin and said that she intended to sell the house No. 15 Frankel Avenue so that she could repay Koh. Kao told the bankrupt that subject to his wife's approval he would buy the house. Kao's wife is Leong Lai Peng, the first respondent. It was agreed between them that the sale price would be $31,000 and that on signing the sale contract Kao would pay the bankrupt 20% of the sale price so that she could pay Koh. Leong Lai Peng had no objection to the purchase and on the 13th July, 1963, Kao instructed Messrs. R. C. H. Lim & Co. to act on behalf of his wife. On the 15th July, 1963, the sale contract was signed by the bankrupt and Leong Lai Peng. Messrs. R. C. H. Lim & Co. also acted for the bankrupt. The sum of $6,200 was paid as deposit on that day by the purchaser to the bankrupt. The contract provided for completion on the 15th October, 1963, or earlier at the vendor's option and the vendor was to give vacant possession to the purchaser on completion. Suit 1578 of 1961 first came on for trial on the 6th August, 1963, and continued to the 9th August, 1965, and it was adjourned for further hearing on a date to be fixed by the registrar. On the 16th August, 1963, Messrs. R. C. H. Lim & Co. wrote to Leong Lai Peng requesting her to call at their office to execute the conveyance. On the 17th August, 1963, Leong Lai Peng handed to Messrs. R. C. H. Lim & Co. two cheques, one for $16,000 and the other for $9,902.80 making a total of $25,902.80 which was the balance due on completion of the purchase. The bankrupt paid to the Chung Khiaw Bank $16,509.30 out of the purchase money.

This was the sum due to the bank by the bankrupt on the mortgage. The bankrupt executed the conveyance in favour of Leong Lai Peng on 17th August, 1963, and delivered it as an escrow pending completion of the reconveyance by the bank. The bank executed the reconveyance on the 21st August, 1963, and the sale by the bankrupt to Leong Lai Peng was completed on that date. After payment of the legal charges and disbursements the bankrupt received $3,146.11 on completion of the sale which sum together with the deposit of $6,200 made a total of $14,346.11 and that was all that the bankrupt received from the sale of the property. On the day that she purchased the property, Leong Lai Peng mortgaged it to the Chung Khiaw Bank to secure on overdraft on her current account up to the limit of $16,000 and the cheque for $16,000 which she handed to Messrs. R. C. H. Lim & Co. on the 17th August, 1963, was drawn on this account. The bankrupt utilised the $14,346.11 to pay off Koh Sin Bin and some other creditors and the sum which went into the bankrupt's pocket was only $570.11. The bankrupt's account of her disposal of the proceeds of sale was not challenged by the appellant. The further hearing of Suit 1578 of 1961 took place on the 2nd and 3rd day of September, 1963, and the petitioning creditor obtained judgment against the bankrupt on the 27th September, 1963, in the sum of $129,150. On the 3rd October, 1963, the petitioning creditor levied execution on the judgment and seized all the furniture at No. 15 Frankel Avenue. Leong Lai Peng took out an interpleader summons claiming that part of the furniture seized was her property she having purchased it from the bankrupt on the 21st July, 1963, for $2,500. On the 13th November, 1963, Kulasekaram J. dismissed Leong Lai Peng's claim. As the learned judge gave no reasons for his decision it is not known on what grounds the claim of Leong Lai Peng was dismissed. At the time of the seizure of the furniture the bankrupt was still living at No. 15 Frankel Avenue and at the date of the hearing of the motion, on the 23rd September, 1964, the bankrupt had not vacated the house and was occupying a room at the rear portion of the house.

These are shortly the facts.

The appellant in the lower court relied on three grounds to set aside the conveyance; First, under section 51 of the Bankruptcy Ordinance; Second, under section 3(1)(b) and section 46 of the Bankruptcy Ordinance; and Third, under section 52 of the Bankruptcy Ordinance.

On the evidence before him the learned trial judge came to the following conclusions: (1) the conveyance was made for valuable consideration; (2) when the bankrupt decided to sell the house she had no intention whatsoever of defeating her creditors; (3) the bankrupt's dominant motive in selling the house was to pay off with the proceeds of sale as many of her creditors as she could and not to delay, hinder or defeat her creditors; and (4) Kao and Leong Lai Peng acted in good faith when the property was conveyed to Leong Lai Peng.

On these conclusions the learned trial judge held: (1) that the conveyance was not made fraudulently and the conveyance was not therefore void against the official assignee under section 51; (2) that the conveyance was not an act of bankruptcy under section 3(1)(b) and even if the conveyance was made fraudulently the respondent was entitled to invoke section 53 to protect the conveyance; and (3) that section 52 had no application to this case.

The main ground of appeal is that the learned trial judge was wrong in fact and in law when he held that the conveyance was not fraudulent within the meaning of section 3(1)(b) of the Bankruptcy Ordinance.

The learned trial judge has found that there was valuable consideration for the sale of the house and the furniture and the appellant does not complain about this finding. He, however, complains that the learned trial judge failed to have regard to all the circumstances of the case when he was determining whether or not the parties to the sale had acted in good faith or were fraudulent.

Learned counsel for the appellant contends that the following circumstances in this case are badges of fraud: (1) the bankrupt continued to be in possession of the house and furniture after the sale; and (2) the completion of the sale of the house was expedited and completed while the trial of the suit brought by the petitioning creditor against the bankrupt was pending. He further contends that in considering whether the continuance in possession is a fraud distinction must be made between transfers of interests in land and transfers of personal chattels as in the latter case there is a *prima facie* presumption of fraud.

It is submitted by learned counsel for the appellant that the parties to the sale had not given a satisfactory explanation of these circumstances which are looked upon as badges of fraud and that they had not rebutted the *prima facie* presumption of fraud as regards the sale of the furniture.

In an action of this nature where the conveyance is for valuable consideration, the onus of proof of fraud on the part of the grantor and that the grantee was a privy to the intent rests upon the plaintiff. The question of intent to defraud creditors is always one of fact, which the court has to decide on the merits of each

particular case after taking all the circumstances surrounding the making of the alienation into account.

There are a number of circumstances which weigh with the court in determining whether in any particular case there was intent to defraud creditors and one of these indications or badges of fraud is the continuance of the grantor in possession of the property he has purported to alienate when such continuance in possession is not in accordance with the terms and object of the conveyance. Another indication is that the alienation is made after a writ has been issued against the grantor.

Now what is the evidence given by the parties to the conveyance regarding the possession of the house? The contract of sale provided that the vendor was to give vacant possession to the purchaser on completion of the sale. What happened was that the bankrupt had failed to obtain alternative accommodation and when the conveyance was signed she requested her brother to allow her to live in the house for another month or so until she could obtain some other accommodation and her brother agreed to this. In November, 1963, the bankrupt informed her brother that although she had tried very hard she had failed to obtain alternative accommodation and requested him to allow her to live in one room at the rear portion of the house. Kao and his wife Leong Lai Peng agreed to this and thereupon they took possession of the house and rented it to a European family at $175 p.m. Ever since that day Leong Lai Peng has been collecting the rent. On those facts the learned trial judge was of the view that it was not correct to say, as contended by the appellant, that the bankrupt was still in possession of the house after the conveyance had been signed. The learned trial judge said: "It is true that the bankrupt continued to reside in a room at the rear portion of the premises free of rent but she was there on sufferance. She was certainly not in possession of the premises." And he further said: "In the present case the bankrupt was allowed by the respondent to remain on the premises on humanitarian ground. The fact that the bankrupt was still on the premises after the sale of the property to the respondent was therefore no evidence of fraud or bad faith on the part of the respondent." In my view one cannot quarrel with the finding of the learned trial judge that the bankrupt was not in possession of the house.

Learned counsel for the appellant points out that the learned trial judge has found that Leong Lai Peng purchased the house to let it out fully furnished and that she had paid $2,500 on the 21st July for the furniture and yet the bankrupt kept possession of the furniture after she had been paid for it and he submits that this raises a presumption of fraud that the bankrupt and Leong Lai Peng colluded in the sale to defeat the creditors and that that presumption has not been rebutted. In my view the bankrupt's continued possession of the furniture has been satisfactorily explained away. The house was to be vacated by the bankrupt; it was to be let out fully furnished; the furniture was bought to furnish that house; in these circumstances where was the need for Leong Lai Peng to take the furniture away? There can be no design to defraud in this case. In any case I think that possession of the furniture was delivered to Leong Lai Peng as far as possession under the circumstances could be given. The furniture was in the house of Leong Lai Peng and there could have been no delivery of the furniture; it would have been absurd to have removed the furniture from the house since it must be afterwards brought back to the very same house in order that the house might be let out fully furnished.

Learned counsel for the appellant further submits that the sale was expedited so that the house would not be available to the petitioning creditor. Now what is the evidence regarding the completion of the sale? The learned trial judge found that the bankrupt gave instructions on or before the 16th August, 1963, for the early completion of the sale. It was suggested by the appellant that the completion of the sale was advanced because the bankrupt knew that Suit 1578 of 1961 was coming up for further hearing on the 2nd September. The learned trial judge however on the evidence before him came to the conclusion that the earliest date on which the bankrupt could have came to know that the case was fixed for further hearing on the 2nd September was the 22nd August and he was of the view that the date of hearing of Suit 1578 of 1961 did not play any part in the bankrupt's decision to sell the property in question and that if the bankrupt had any intention of preventing the property from falling into the hands of the petitioning creditor she could have sold it in 1961 when she was served with the writ by the petitioning creditor. On the evidence the learned trial judge was of the opinion that when the bankrupt decided to sell the property she had no intention whatever of defrauding her creditors and that she sold her property to pay off some of her creditors. In my view there was sufficient evidence on which the learned trial judge could make these findings and I am unable to say that he was wrong.

It appears to me that the learned trial judge has taken everything into consideration that he should when he decided that there was no fraud in this case.

For these reasons I think the appeal should be dismissed with costs.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Chung & Co.; Yin Ee Kheng; R. C. H. Lim & Co.*

NEW INDIA ASSURANCE COMPANY LTD. v. LEWIS

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tah F.J. and Chua J.) October 18, 1966]

[Singapore — Federal Court Civil Appeal No. Y10 of 1966]

Contract — Insurance — Arbitration clause — Whether dispute as to existence of contract itself can be referred to arbitrator.

This was an appeal against the order of the High Court appointing an arbitrator under the terms of an insurance policy. The insurance policy which related to a horse was due for renewal. The insurance company required a veterinary certificate before the renewal of the insurance. The respondent sent the amount required for the renewal but did not send the veterinary certificate. The horse died. On a claim by the respondent the appellants argued that there was no policy in force and, therefore, there was no right to arbitration.

Held: the issue between the parties was whether the contract of insurance was in force at the time of the death of the horse and it is settled law that such an issue cannot go to arbitration under an arbitration clause in the contract.

Cases referred to:—

(1) *Heyman* v. *Darwins Ltd.* [1942] 1 All E.R. 337 at p. 343.

(2) *Toller* v. *Law Accident Insurance Society Ltd.* [1936] 2 All E.R. 952.

FEDERAL COURT.

G. S. Hill for the appellants.

L. A. J. Smith for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal against an order of Buttrose J. in an originating summons. The application was taken out by the respondent in this appeal for an order pursuant to section 8 of the Arbitration Ordinance, Chapter 10, that Denis H. Murphy, advocate and solicitor of Hongkong Bank Chambers, Singapore, or some other fit and proper person may be appointed to act as arbitrator under clause 10 of the conditions of an insurance policy No. H/618/10/0013/64 dated the 24th day of April, 1964, issued to the respondent by the appellants. Buttrose J. made an order in terms of the application.

The appellants on the 5th May 1964 issued a policy of insurance, covering against the risks specified therein, on a horse known as "Bonny Creeper", in consideration of the payment of a premium of $841. The period of insurance under the policy extended from noon on the 24th April 1964 to noon on the 24th April 1965. The policy contained an arbitration clause in the following terms:—

"10. All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company."

On 16th March 1965 i.e. prior to the expiry of the policy, the appellants sent a "renewal notice" to the respondent who then sent to the appellants $841 for the renewal of the policy. The appellants issued a receipt dated 22nd April 1965 for this payment and sent it with a letter dated 23rd April 1965 in the following terms:—

"Dear Sir,

Re: Renewal of Policy H/618/10/00131/64
Racehorse "Bonny Creeper" *alias*
Bacqlava II"

We thank you for your instructions to renew the above policy for one year from 24th April, 1965.

We shall be much obliged if you would forward us the enclosed veterinary certificate form duly completed by the veterinary surgeon to enable us to renew the policy."

Our temporary receipt for $841.40 is enclosed.

We would also request you to confirm that 'Bonny Creeper' has been renamed 'Bacqlava II'.

Since the policy is expiring on 24th April, 1965 kindly see that the veterinary report is forwarded to us without delay."

The horse "Bonny Creeper" died on the 30th April 1965 but, owing to circumstances which are not material for the purposes of the present proceedings, it was not examined by a veterinary surgeon between 23rd and 30th April 1965.

The respondent lodged a claim which the appellants denied on the ground that there was no policy in force in respect of the horse at the time of its death. The respondent took the view that at the material time there was in existence an insurance policy covering the horse having regard to the express provisions of the policy dated 5th May 1964, to the renewal notice sent by the appellants notifying him that his policy was due for renewal, to the payment by him of the premium of $841 and the acceptance of that payment. The appellants however took the view that the acceptance of the premium and the issue of a new policy was conditional upon their receipt of a certificate from a veterinary surgeon and as there was no such certificate which had been received by them at the material time there was no policy of insurance in respect of the horse.